Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

80-47

No._____

In the Supreme Court of the United States

October, 1979

Johnny Glenn McIntyre,

Petitioner,

v.

State of Louisiana,

Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

PETITION FOR CERTIORARI

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July, 1980

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. _____

JOHNNY GLENN McINTYRE, Petitioner,

v.

STATE OF LOUISIANA, Respondent.

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF LOUISIANA

PETITION FOR CERTIORARI

QUESTIONS PRESENTED

(1) Whether recognition of an independent public interest in the enforcement of Sixth Amendment guarantees requires

that Johnson v. Louisiana, 406 U.S. 356 (1972) and Apodaca v. Oregon, 406 U.S. 404 (1972) be overruled.

(2) In the alternative, whether Johnson v. Louisiana, 406 U.S. 356 (1972) and Apodaca v. Oregon, 406 U.S. 404 (1972) should be modified or limited so as to require unanimous jury verdicts in state court criminal proceedings where the mandatory penalty upon conviction is life imprisonment without parole or where the procedural safeguards of state law are inadequate to exclude jurors of questionable impartiality.

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OPINION BELOW

The opinion of the Supreme Court of Louisiana in proceeding number 65,439 on the docket of its court, dated February 15, 1980, affirming petitioner's conviction of aggravated rape and sentence to life imprisonment without benefit of probation, parole, or suspension of sentence appears in the appendix hereto, p. 1a, infra. It is reported at 381 So.2d 408 (La. 1980).

JURISDICTION

This judgment of the Louisiana Supreme Court affirming petitioner's conviction became final upon that Court's denial of Motion for Rehearing April 7, 1980. See p. 10a, infra. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case arises under the Jury Trial clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. Relevant Louisiana Statutes are set forth in Appendix C, p. 11a, infra.

STATEMENT OF THE CASE

Twice the prosecution in this case has demonstrated its inability to convince all of the jurors that the defendant was beyond a reasonable doubt guilty of aggravated rape of his mother-in-law. His first trial resulted in conviction by an 11-1 verdict which was reversed on appeal because of trial court error in refusing a defense challenge for cause of a prospective juror who was a former state trooper. State v. McIntyre, 365 So.2d

1348 (La. 1978). Petitioner was retried, again found guilty by an 11-1 verdict, and mandatorily sentenced to life imprisonment without benefit of probation, parole, or suspension of sentence.

Petitioner appealed this second conviction to the Louisiana Supreme Court complaining of his conviction by a less than unanimous jury and of the patent partiality of four of the eleven jurors who had voted for conviction. All four knew that the defendant had previously been tried for this offense and was now being tried again. Three knew that his first trial had resulted in conviction. One had been called as a prospective juror in the defendant's first trial but had been dismissed peremptorily by the defense. Another stated that a supervisor of his at the plant where he worked had served on

the jury in the first trial and had stated in his presence after the trial that he thought that the defendant had been proven guilty beyond a reasonable doubt. Another had read newspaper accounts of the alleged crime, had noted that the newspaper had never printed a retraction, had discussed this with numerous acquaintances all of whom favored guilt, had a personal opinion that the victim had been raped, and had an impression that the defendant had done it. See pp. 3a, 4a, and 9a, infra. The Louisiana Supreme Court affirmed, holding that the trial judge did not abuse his discretion and that non-unanimous jury verdicts had been upheld by the United States Supreme Court.

The federal questions sought to be reviewed were raised by assignment of error to the Louisiana Supreme Court and

are specifically passed upon in the Opinion of the Court Below, p. 1a, infra. These questions were also raised by assignment of error in petitioner's first appeal to the Louisiana Supreme Court.

ARGUMENT

In Johnson v. Louisiana, supra, and Apodaca v. Oregon, supra, this Court has held that neither the Fourteenth Amendment nor the Sixth Amendment require unanimous jury verdicts for conviction in state court criminal proceedings. (Curiously, a majority of the members of the court in Apodaca were of the opinion that the Sixth Amendment guaranteed unanimous jury verdicts in federal criminal proceedings.) All arguments for and against unanimous jury verdicts, save one, were considered in Johnson and Apodaca. We urge that argu-

ment here.

That unconsidered argument is premised upon this Court's "recognition of an independent public interest in the enforcement of Sixth Amendment guarantees." Gannett Co., Inc. v. DePasquale, 99 S.Ct. 2898, 2907 (1979). That argument is also premised upon this Court's recognition of the importance of the reasonable doubt standard "to command the respect and confidence of the community in applications of the criminal law." In Re Winship, 297 U.S. 358, 362, 90 S.Ct. 1068, 1072 (1970).

In short, this Court has not previously considered the important question of whether or not the Sixth Amendment guarantee of jury unanimity is essential for commanding public confidence in and respect for jury verdicts. Petitioner submits that hitherto this Court has

approached the question of jury unanimity strictly from the standpoint of the interest of the accused. Petitioner submits that the interest of the public at large in commanding respect for law and order require unanimous jury verdicts in serious state court criminal cases. The offenses of which Johnson and Apodaca were convicted were far less serious than the offense of which petitioner was convicted. The punishments dealt Johnson and Apodaca were far less severe than the punishment dealt petitioner. In neither Johnson nor Apodaca were serious questions of jury partiality raised.

There can be no public confidence in this petitioner's conviction. To allow this petitioner's conviction to stand leaves the public in doubt.

Respectfully submitted,

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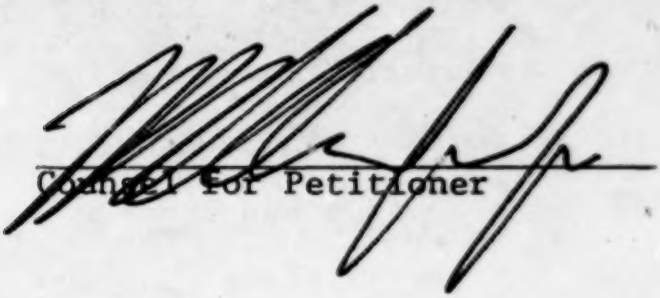


Counsel for Petitioner

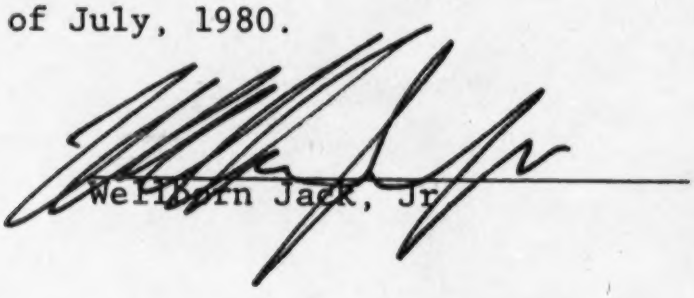
July 7, 1980

CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served have been served, that three copies of this Petition for Certiorari have this date been mailed to Mr. James M. Johnson, Assistant District Attorney, Webster Parish Courthouse, Minden, Louisiana, 71055, and that I am a member of the bar of this Court representing the party in behalf of whom such

service has been effected.

Shreveport, Louisiana, on this the 7th day of July, 1980.



Welborn Jack, Jr.

APPENDIX A

OPINION OF COURT BELOW

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

VERSUS NO. 65,439

JOHNNY G. MCINTYRE

DECIDED FEBRUARY 15, 1980
REHEARING DENIED APRIL 7, 1980
PUBLISHED IN 381 So.2d 408 (La. 1980)

DIXON, Justice.

The defendant was indicted for aggravated rape and subsequently convicted. On appeal from that conviction this court reversed because of the trial court's error in refusing a defense challenge for cause of a prospective juror who was a former police captain. State v. McIntyre, 365 So. 2d 1348 (La. 1978). Defendant was retried, again found guilty, and sentenced to life at hard labor without benefit of probation, parole or suspension of sentence. Defendant now appeals from that conviction, urging eight assignments of error, four of which have been abandoned.

ASSIGNMENT OF ERROR NO. 1

The defendant contends that the trial court erred in denying his challenges for cause of four prospective jurors. The defendant exhausted his peremptory challenges before completion of the petit jury panel,

and is therefore able to complain of the court's action in refusing his challenges for cause. C.Cr.P. 800.

C.Cr.P. 797 provides in part:

"The state or the defendant may challenge a juror for cause on the ground that:

. . . .

(2) The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence;
(3) The relationship, whether by blood, marriage, employment, friendship, or enmity between the juror and the defendant, the person injured by the offense, the district attorney, or defense counsel, is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict; . ."

Defendant argues that under these provisions his challenges to prospective jurors Kimball, Mason, Tyler and Hortman should have been granted.

This court has repeatedly held that the trial court is vested with broad discretion in ruling on challenges for cause and that the trial court's ruling will be

reversed only when it appears, upon review of the voir dire as a whole, that the court's exercise of its discretion has been arbitrary or unreasonable, resulting in prejudice to the accused. State v. Dickinson, 370 So.2d 557 (La. 1979); State v. Webb, 364 So.2d 984 (La. 1978); State v. Drew, 360 So.2d 500 (La. 1978). Furthermore, a charge of bias may be removed by the rehabilitation of a prospective juror. See State v. Webb, supra; C.Cr.P. 797. There have been instances, however, in which we have held that, because of the totality of the circumstances, it was unreasonable for the trial court to conclude that a prospective juror could be impartial despite his manifestations that he could. State v. Monroe, 366 So.2d 1345 (La. 1978); State v. McIntyre, supra.

The challenges against prospective jurors Kimball, Mason and Tyler were essentially predicated on their prior knowledge of the offense and the defendant's previous conviction. Mrs. Kimball had been called as a prospective juror in the defendant's first trial but had been dismissed peremptorily by the defense. She had read a newspaper account of that trial and believed that the verdict had been guilty. Mr. Mason stated that a fellow employee of his had been on the jury in the first trial and had stated after the trial that he (the fellow employee) thought that the defendant had been proven guilty beyond a reasonable doubt. Mr. Tyler knew that the defendant had been found guilty in the first trial. He had read newspaper accounts of the alleged crime and had discussed it with acquaintances. He had an opinion that the victim had been raped and an impression that the defendant

had done it.

Each of the prospective jurors also gave testimony that tended to rebut any inference of bias that might have arisen from the testimony set out above. Mrs. Kimball stated that she had not formed an opinion as to the defendant's guilt or innocence. She testified that she would give the defendant the full benefit of the requirement that the state prove the defendant guilty beyond a reasonable doubt. Mr. Mason stated that the statements of his fellow employee would not influence his decision in this case. He further stated that his decision would be based solely on the facts and the law as given to him by the trial court. Mr. Tyler stated that he would put aside any prior knowledge or discussions he had had about the case in making his decision and indicated that he would presume the defendant innocent and would not vote to convict unless the state had proven him guilty beyond a reasonable doubt.

From a review of the record we cannot conclude that the trial court abused its discretion in denying the defendant's challenges for cause against these jurors. The circumstances do not indicate that the jurors could not be fair and impartial. The facts brought out by the defendant are not so strong as to cause us to overturn the trial court's exercise of its broad discretion in this area.

The defendant's challenge against prospective juror Hortman was based on her relationship to the prosecuting attorney. She stated that she did not know him on a personal basis but that she knew who he

was. She had had dealings with his senior law partner and she assumed that the senior partner would not practice with someone unless he was (in the words of defense counsel) a "pretty fine man." She was also acquainted with a number of state witnesses.

We have held that the mere fact that a juror is related to a participant in the case does not disqualify the juror from service. The party challenging the juror must also show that the relationship would influence the juror in arriving at a verdict. State v. Gray, 351 So.2d 448 (La. 1977); State v. Jones, 345 So.2d 1157 (La. 1977). In the instant case, the defendant fails to show how the rather tenuous relationship that the juror had with the prosecuting attorney could have influenced her decision in arriving at a verdict. The juror stated that she would be able to weigh the evidence and arrive at an impartial verdict. We cannot say that the trial court abused its discretion in finding that it was not reasonable to conclude that the juror's relation with the prosecuting attorney would have influenced her in making her decision as to guilt or innocence.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 3

At the trial the coroner of Webster Parish, Dr. S. W. Pittman, testified as to the statements made to him by the victim of the crime. The trial court overruled the defendant's objection to the testimony on the ground that the victim's statements were part of the res gestae and hence admissible under an exception to the hearsay rule. The defendant assigns error to the

trial court's action.

R.S. 15:447 provides:

> "Res gestae are events speaking for themselves under the immediate pressure of the occurrence, through the instructive, impulsive and spontaneous words and acts of the participants, and not the words of the participants when narrating the events. What forms any part of the res gestae is always admissible in evidence."

R.S. 15:448 provides:

> "To constitute res gestae the circumstances and declarations must be necessary incidents of the criminal act, or immediate concomitants of it, or form in conjunction with it one continuous transaction."

The defendant argues (and the state does not contest the point) that the statements were made several hours after the crime had occurred. It does not appear from the record that the statements were made under the immediate pressure of the crime, nor were the statements necessary incidents of the crime, or immediate concomitants of it, or a part of one continuous transaction involving the crime. Cf. State v. Drew, supra. Therefore, the statements were not a part of the res gestae and were not properly admitted in evidence.

Nor was the statement admissible under the exception to the hearsay rule, long followed by this court, that allows the

admission of early complaints of rape victims. See State v. Hatcher, 372 So.2d 1024 (La. 1979); State v. McCloud, 357 So.2d 1132 (La. 1978); State v. Elzie, 351 So.2d 1174 (La. 1977). The record indicates that the victim's statements to Dr. Pittman were made a considerable time after the rape occurred, after the victim had spent an undetermined amount of time in the Bossier City, Shreveport and Minden police facilities. She had reported the rape to the police in those cities before talking to Dr. Pittman. Therefore, the victim's statements to Dr. Pittman were not spontaneous declarations made under the pressure of the rape. Cf. State v. Hatcher, supra; State v. Elzie, supra.

We have held, however, that even if testimony is admissible hearsay, if it is merely cumulative or corroborative of other testimony adduced at trial, then the admission of the hearsay is harmless. State v. Vaughn, 378 So.2d 905 (La. 1979); State v. Ford, 336 So.2d 817 (La. 1976). In the present case the testimony of Dr. Pittman was entirely consistent with that given by the victim and served merely to corroborate that testimony. It was harmless error for the trial court to admit the testimony.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 5

As the defendant relates the facts, the trial court instructed the jury, in reference to evidence as to flight, that: "You must decide whether such flight was due to consciousness of guilt or for other

reasons unrelated to whether or not he was guilty." The instruction is not in the record. The defendant does not deny that evidence of flight is admissible in criminal cases. See State v. Davies, 350 So.2d 586 (La. 1977). He argues, however, that the trial court's remarks amounted to an improper comment on the evidence in that the court instructed the jury that they must make some inference from any evidence of flight that might be introduced. The defendant argues that it is for the jury to decide if any inference at all is to be drawn from the evidence.

We find nothing improper in the court's purported remarks. The court was merely reminding the jurors of their duty to review all of the evidence presented and to draw therefrom whatever inference that they thought proper. The court did not force the jurors to choose between two inferences but merely stated that a jury must either consider that evidence introduced is probative of the defendant's guilt or that it is not.

This assignment lacks merit.

ASSIGNMENT OF ERROR NO. 7

By this assignment of error the defendant urges the unconstitutionality of the non-unanimous verdict in criminal cases. He argues basically that a non-unanimous verdict system dilutes the standard that a defendant must be proven guilty beyond a reasonable doubt.

The less than unanimous verdict has

been upheld by the United States Supreme Court and by this court. Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972); State v. Hodges, 349 So.2d 250 (La. 1977); State v. Ledet, 337 So.2d 1126 (La. 1976).

This assignment of error is without merit.

For reasons assigned, the conviction and sentence are affirmed.

DENNIS, J., dissents with reasons.

DENNIS, Justice, dissenting.

I respectfully dissent.

Although I agree that the trial judge has great discretion in deciding whether to allow challenges for cause, I think it unlikely that a prospective juror, his protests to the contrary notwithstanding, can be impartial after: (1) having read a newspaper account of defendant's first trial and agreed with the guilty verdict after being peremptorily challenged by defendant, or (2) having discussed the case with a fellow employee who was a member of the jury in defendant's first trial and convinced of his guilt.

APPENDIX B
DENIAL OF REHEARING

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

FOR IMMEDIATE NEWS RELEASE

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 7th day of April, 1980, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

* * * * * *

REHEARINGS DENIED:

* * * * * *

65,439 State v. McIntyre
DENNIS, J., would grant a rehearing.

* * * * *

APPENDIX C

RELEVENT LOUISIANA STATUTES

Louisiana Constitution of 1974, Art. 1, Sec. 17

§ 17. Jury Trial in Criminal Cases

Section 17. A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict. The accused shall have a right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury.

Louisiana Code of Criminal Procedure, Art. 797

Art. 797. Challenge for cause

The state or the defendant may challenge a juror for cause on the ground that:

(1) The juror lacks a qualification required by law;

(2) The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence;

(3) The relationship, whether by blood, marriage, employment, friendship, or enmity between the juror and the defendant, the person injured by the offense, the district attorney, or defense counsel, is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict;

(4) The juror will not accept the law as given to him by the court; or

(5) The juror served on the grand jury that found the indictment, or on a petit jury that once tried the defendant for the same or any other offense.

Louisiana Code of Criminal Procedure, Art. 799

Art. 799. Number of peremptory challenges

In trials of offenses punishable by death or necessarily by imprisonment at hard labor, each defendant shall have twelve

peremptory challenges, and the state twelve for each defendant. In all other cases, each defendant shall have six peremptory challenges, and the state six for each defendant.

R.S. 14:42

§ 42. Aggravated rape

Aggravated rape is a rape, heterosexual or homosexual, committed where the sexual intercourse is deemed to be without the lawful consent of the victim because it is committed under any one or more of the following circumstances:

(1) Where the victim resists the act to the utmost, but whose resistance is overcome by force;

(2) Where the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution; or

(3) Where the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense.

Whoever commits the crime of aggravated rape shall be punished by life imprisonment without benefit of parole, probation or suspension of sentence.

[Act No. 343 of 1977]